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Supreme Court, U.S.
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No. 01-1878

In The

Supreme Court of the United States

STATE OF HAWAII, *et al.*,

Petitioners,

v.

BRIAN VINSON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. The United States does not deny that the decision below conflicts with the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 114-15 (2d Cir. 2001). Nor does it dispute the importance, to all fifty States, of the question whether acceptance of federal funds effects a waiver of the States' sovereign immunity against private suits brought under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Nevertheless, the Government urges the Court to deny review, arguing primarily that *Garcia* was wrongly decided. *See* Brief for the United States in Opposition ("U.S. Br.") at 7-10. As we shall demonstrate, the United States' submission in this regard ignores the safeguards that this Court has established for Spending Clause waivers and rests upon an erroneous suggestion that the rule adopted by the Second Circuit prescribed a subjective test for waiver of sovereign immunity. The Government also attempts to minimize the significance of the circuit split by claiming that the Second Circuit's holding merely established "a transitional rule that will, in short order, be of no further consequence." *Id.* at 10. However, this argument rests on the mistaken notion that *Garcia* applies only to Section 504 claims arising before 1997, *id.* at 10-11; in fact, *Garcia* said no such thing.

a. Echoing the reasoning of the Ninth Circuit and the other courts of appeals it has followed, the United States argues that a waiver of sovereign immunity may be inferred from, without more, (i) the language of 42 U.S.C. § 2000d-7(a)(1) purporting to abrogate Eleventh Amendment immunity in Section 504 cases, and (ii) the acceptance of federal funds. U.S. Br. at 6 & n.3. As both the Second Circuit and Judge O'Scannlain have demonstrated, this Court's cases have required more. *See Garcia*, 280 F.3d at 114; *Douglas v. California Dep't of Youth Auth.*, 285 F.3d 1226, 1228-31 (9th Cir.) (O'Scannlain, J., dissenting from the denial of rehearing en banc), *cert. denied*, 122 S. Ct. 2591 (2002). Specifically,

this Court has emphasized the "fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-81 (1999);[1] *see also Barnes v. Gorman*, 122 S. Ct. 2097, 2101 (2002) ("Just as a valid contract requires offer and acceptance of its terms, 'the legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and *knowingly* accepts the terms of the "contract."'") (emphasis added) (citation omitted).

Section 2000d-7(a)(1) speaks only to the latter (i.e., Congress' offer); as to the former (i.e., the effect of the State's action), the Court has laid down three principles that the United States simply ignores: (i) "state sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected," *College Sav. Bank*, 527 U.S. at 682; (ii) "an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a *known* right or privilege,'" *id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (emphasis added); and (iii) "'[c]ourts indulge in every reasonable presumption *against* waiver' of fundamental constitutional rights," *id.* (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)) (emphasis added). The Second Circuit and Judge O'Scannlain correctly concluded that application of these principles required analysis of the legal circumstances that existed when the State committed the act

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[1] The Court drew this distinction in the course of rejecting the doctrine of constructive waiver arising from Congress' mere occupation of a field. As Judge O'Scannlain has pointed out, even though " 'constructive waiver' doctrine is not at issue here, . . . the Court's recent teachings on how explicit a State's waiver must be are instructive" in the context of alleged Spending Clause waivers. *Douglas*, 285 F.3d at 1228 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

said to have waived its constitutionally guaranteed immunity. Such an inquiry is necessary to determine whether the acceptance of federal funds reasonably reflected an intentional decision to relinquish a known right.

The United States would blithely abandon this inquiry altogether, disparaging it as an "attempt to add an additional, subjective component to the analysis," U.S. Br. at 9, in conflict with *Lapides v. Board of Regents of the University Sys. of Georgia*, 122 S. Ct. 1640 (2002). In *Lapides*, the Court held that a State's voluntary removal of an action to federal court effects a waiver of its Eleventh Amendment right to immunity from suit in federal court. *Id.* at 1646. The Court rejected Georgia's argument that "its motive for removal was benign," and was not intended "to obtain litigating advantages for itself," *id.* at 1644, explaining that "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 1645.

In stark contrast to the argument rejected in *Lapides*, the Second Circuit in *Garcia* did not purport to inquire into New York's subjective intentions at the time it accepted the federal funds said to have effected the waiver. Rather, the court conducted a manifestly objective inquiry into the existing legal circumstances. It concluded that because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damage suits, since *by all reasonable appearances* state sovereign immunity had already been lost." 280 F.3d at 114 (emphasis added) (citing *College Sav. Bank*, 527 U.S. at 682); *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (describing the objective inquiry into the state of the law to assess claims of qualified immunity).[2]

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[2] The Court's qualified immunity cases also refute the United States' implicit suggestion, *see* U.S. Br. at 10, that an immunity inquiry that turns on the state of the law during the relevant time period is somehow novel. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640

(Continued on following page)

The Government also complains that the Second Circuit's rule attaches significance to the enactment of the ADA in 1990, four years after the passage of Section 2000d-7, arguing that the later enactment of a separate statute should not change the result of the waiver inquiry. U.S. Br. at 8. But this result necessarily flows from the contractual nature of the waiver analysis. *See Barnes*, 122 S. Ct. at 2100-01. When the offeror has informed the recipient of consideration that he will be deprived of the right whether he takes the offered consideration or not, it is not reasonable to infer, from the acceptance of the consideration, a knowing and intentional decision to waive a constitutional right.

To adopt this Court's analogy, *see College Sav. Bank*, 527 U.S. at 682, no one would suggest that a criminal defendant had validly waived his right to a jury trial in exchange for a lesser sentence if Congress enacted a law abolishing jury trials. *See, e.g., United States v. Ruiz*, 122 S. Ct. 2450, 2455 (2002) ("[T]he Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowingly, intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences.'") (citation omitted). This conclusion would hold even though an identical plea bargain struck before the enactment of the statute would be perfectly valid.[3]

(1987) (defendants' claim of immunity must be assessed "in the light of pre-existing law") (citing cases).

[3] The Government suggests that this Court has held that assertions of immunity must be assessed on a claim-by-claim basis. U.S. Br. at 8 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103 n.12 (1984)). The cited footnote says no such thing; the Court merely rejected an argument that the presence of the United States as a plaintiff somehow vitiated the State's assertion of sovereign immunity with respect to a state law claim brought solely by a private plaintiff in the same case.

b. The United States rests its attempt to downplay the lasting importance of *Garcia* upon its assertion that the Second Circuit implicitly limited its holding to cases arising "at the latest, in 1997. . . . " U.S. Br. at 10. The court implied no such thing. It merely observed in a footnote that "*an argument* could be made that if there is a colorable basis for the state to suspect that an express congressional abrogation is invalid, then the acceptance of funds *might* properly reveal a knowing relinquishment of sovereign immunity." *Garcia*, 280 F.3d at 114 n.4 (emphases added). The footnote went on to explain that "[e]ven supposing such an argument to have merit," it was not available in that case because the events at issue took place at a time "when even the most studied scholar of constitutional law would have had little reason to doubt the validity of Congress's asserted abrogation" in Title II, *id.*, that is, before this Court had decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Second Circuit did not even consider whether assertions of immunity in Section 504 cases arising after *City of Boerne* would benefit from *Garcia*, and the issue likewise does not arise in this case because the events giving rise to this suit took place before *City of Boerne*.

Moreover, the Second Circuit's dictum was predicated upon its assumption that a reasonable State would have a basis to question whether its sovereign immunity had been validly abrogated by Title II after *City of Boerne*. The Ninth Circuit, however, has deprived the States in its jurisdiction of any such reasonable basis by holding that Title II *does* validly abrogate the States' sovereign immunity. *See Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1171 (9th Cir.) (reaffirming prior precedent), *reh'g en banc denied*, 294 F.3d 1166 (9th Cir.), *petition for cert. filed*, No. 02-479 (U.S. Sept. 23, 2002). Thus, the rule announced in *Garcia* would continue to apply to all cases arising in the Ninth Circuit into the indefinite future. *Compare United States v. Lanier*, 520 U.S. 259, 269 (1997) (in the analogous context of qualified immunity, state of the law

determined by looking to the law of the Circuit) (citing cases).[4]

2. The United States seeks to avoid the implications of this Court's conclusion that 42 U.S.C. § 2000d-7(a)(2) is ambiguous, *see Lane v. Pena*, 518 U.S. 187, 198 (1996), by arguing that the Court should simply ignore subparagraph (2) (describing the remedies available "[i]n a suit against a State") in considering whether Congress has unambiguously conditioned federal funds upon a waiver of sovereign immunity against private damage suits. U.S. Br. at 13-14. Not surprisingly, the Government is unable to cite any authority for this unprecedented suggestion, and this Court's cases effectively repudiate it. In *Lane* itself, the Court expressly considered both subparagraphs (a)(1) and (a)(2) in the course of deciding whether Section 2000d-7(a) effected a waiver of the federal government's sovereign immunity. 518 U.S. at 198-200. More generally, the Court's clear statement jurisprudence forecloses the narrow approach urged by the United States. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981) (holding that a statute claimed to have imposed Spending Power condition on the States was "ambiguous . . . when read in the context of other more specific provisions of the Act").

The United States also argues that Section 2000d-7(a)(2) need not clearly and unambiguously condition funds upon a waiver of sovereign immunity that extends to monetary damages; it is sufficient, the Government asserts, to determine "the waiver's scope . . . by a 'realistic assessment of legislative intent.'" U.S. Br. at 14 (quoting *Franconia Assocs. v. United States*, 122 S. Ct. 1993, 2003

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[4] Indeed, the Solicitor General's suggestion that States should have known that they retained their immunity against private suits for damages under Title II as far back as 1997 comes with particularly poor grace when one considers that the United States continues to maintain that Congress' abrogation of sovereign immunity against such claims is constitutional.

(2002) (internal citation omitted)). Once again, the Government's argument is contrary to this Court's ruling in *Lane*. The Court squarely held that "[t]o sustain a claim that the [federal] Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." 518 U.S. at 192; *see also id.* at 197 ("'[W]here a cause of action is authorized against the federal government, the available remedies are not those that are "appropriate," but only those for which sovereign immunity has been expressly waived.'") (citation omitted).

Franconia is not to the contrary; there, the Court merely held that once Congress had clearly waived the federal government's sovereign immunity against suit, statute of "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." 122 S. Ct. at 2003 (citation omitted). The Court nowhere questioned its holding in *Lane* that "the waiver of sovereign immunity must extend unambiguously to such monetary claims." 518 U.S. at 192.

Finally, the Government claims that its "plausible" reading of the statute, permitting damages against the States even though the language of Section 2000d-7 does not clearly and unambiguously so provide,[5] is necessary to

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[5] The United States briefly argues that "[s]uits against the States for damages . . . fall plainly within the text of Section 2000d-7(a)(2)," because "*Lane* itself made clear that the federal government could be sued for damages for violation of Section 504 when it was sued for its actions as a 'provider' of federal funds." U.S. Br. at 16. In fact, *Lane* said no such thing; after remarking on "the somewhat curious structure of the liability and remedy provisions" of the Rehabilitation Act, the Court simply observed that any waiver could not possibly extend "beyond the narrow category of § 504(a) violations . . . by 'Federal provider[s].'" 518 U.S. at 193. Far from concluding that Congress had clearly and unambiguously waived the federal government's immunity even in this "narrow category," the Court pointedly contrasted "[t]he lack of clarity in [the] 'Federal Provider' provision" with Congress' unambiguous waiver of liability for Section 501 claims. *Id.*

avoid "mak[ing] the statute a practical nullity." U.S. Br. at 16. If Section 2000d-7(a)(2) does not authorize damages suits against the States, the argument goes, it adds nothing, for suits for injunctive relief are already available under *Ex Parte Young*, 209 U.S. 123 (1908). Both the premise and the conclusion the Government would draw from it are flawed.

As to the conclusion, even if application of the clear statement rule would render the statute a "nullity," it does not follow that the rule should not be applied. The goal of the clear statement rule is not to divine the unexpressed intent of Congress; it is to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation" in a federal program. *Pennhurst*, 451 U.S. at 17. As to the premise: read in accordance with the clear statement rule, Section 2000d-7(a) invites waiver of sovereign immunity against suits seeking declaratory and injunctive relief brought directly against a State or its arm that would not be permissible under the *Young* doctrine. *See, e.g., Alden v. Maine*, 527 U.S. 706, 756-57 (1997).[6]

3. The United States does not deny that this Court has noted, but failed to reach, the "argument that implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear

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[6] While admitting that the argument concerning Section 2000d-7 was presented to the court below, the United States argues that the Ninth Circuit's failure to expressly address the issue in its opinion militates against certiorari. U.S. Br. at 12. But the Ninth Circuit has resolutely refused to conduct *any* legal analysis of the serious questions raised by private Section 504 suits for damages against the States, deeming the matter "foreclosed" by Circuit precedent "if they accept federal Rehabilitation Act funds." App. 9a; *see also* App. 22a (O'Scannlain, J., dissenting) ("reluctantly acquiesc[ing]" because bound by Circuit precedent); *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 820-21 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir.), *cert. denied*, 122 S. Ct. 2591 (2002); *cf.* 285 F.3d at 1231 (O'Scannlain, J., dissenting from denial of rehearing en banc) (criticizing the Ninth Circuit's "[b]lind adherence" to circuit precedent despite intervening decisions by this Court).

statement rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)." *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57, 684-85 (1999) (Kennedy, J., dissenting)). Instead, the Government mistakenly claims that Hawaii did not raise this argument in the court below. U.S. Br. at 18. To the contrary, in a supplemental brief submitted in response to the court's order to address sovereign immunity in light of this Court's intervening decisions, petitioners specifically urged the point upon the Ninth Circuit: "Moreover, Congress could never provide the clarity required by *College Savings* because a private suit against a state for violation of Section 504 represents an 'implied cause of action,' permitting courts to fashion any 'appropriate' relief under the 'general rule' discussed in *Franklin v. Gwinnet County Public Schools*, 503 U.S. 60, 71 [(1992)]." Supplemental Letter Brief of Appellants at 5 (No. 00-15534) (9th Cir. April 25, 2001).

On the merits, the United States argues that enactment of Section 2000d-7 satisfies the clear statement rule without more. U.S. Br. at 18.[7] But this argument ignores this Court's insistence that a waiver of sovereign immunity will not arise unless Congress makes clear *in the text* of a statute that States accepting federal funds will be subject to suit for damages. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43, 247 (1985); *Pennhurst*, 451 U.S. at 17; *see also Lane*, 518 U.S. at 192 ("[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied") (citations omitted). Section 2000d-7 does not

[7] The Government suggests that the argument recognized as open in *Alexander* merely refers to the question whether "implied causes of action for Spending Clause legislation are *in general* 'inconsistent' with the clear statement rule," a question not encompassing "the text and structure of the relevant statutes" governing Section 504 actions. U.S. Br. at 20 (emphasis in original). This suggestion is belied by the fact that the precise statute at issue here, Section 2000d-7(a), governed the immunity issue in *Alexander* as well. *See Alexander*, 532 U.S. at 280.

meet that high standard, for neither it nor any other statutory text expressly states that *anyone* is subject to suit for violation of Section 504; rather, Section 2000d-7 merely states that the States are not immune from such suits assuming that the right to bring such actions exists in the first place. In order to learn that private suits are permitted, one must look beyond the United States Code to the United States Reports. To suggest that this provides notice sufficient to satisfy the clear statement rule "misses the crucial point that, when it comes to an award of money damages, sovereign immunity places the [States] on an entirely different footing than private parties." *Lane*, 518 U.S. at 196.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

October 4, 2002

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[8] The statement quoted in the text referred to the Federal Government, not the States, but this Court has repeatedly concluded that it "see[s] no reason why the rule should be different with respect to state sovereign immunity." *College Sav. Bank*, 527 U.S. at 682.